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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

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THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND PAUL BROWN,

Defendant and Appellant.

C060139

(Super. Ct. No. CRF075461)

Defendant Raymond Paul Brown was convicted of assault with great bodily injury, criminal threats, and misdemeanor battery. At the time, he and Patty, his then girlfriend (wife at the time of trial), made statements to the police that he had hit her because he was angry she was talking to another man on the phone. At trial, however, they both recanted these statements, claiming Patty had overdosed on prescription drugs and defendant was simply trying to rouse her from her stupor by slapping and shaking her. On appeal, defendant contends the trial court erred in instructing the jury with CALCRIM No. 359, advising the

jury it could rely on defendant's out-of-court statements to convict only if there was slight additional evidence that he committed a crime. Defendant also contends the court erred in denying him probation based on his failure to accept responsibility or express remorse for his crimes. We shall affirm.

#### **FACTUAL BACKGROUND**

Responding to a 911 hang-up call at the Motel 6, Sacramento Detective Erik Thruelsen was met by defendant at the door. Patty was quietly crying on the bed. Patty's lips were bleeding and she had injuries on the left side of her face. Patty explained she and defendant had been dating for about five or six months and were engaged to be married. Defendant got angry when he believed she was talking to another man on the phone. In his anger, he threw her to the bed, slapped and punched her repeatedly, choked her, and threatened to kill her. Patty did not appear disoriented or under the influence of drugs.

Thruelsen then spoke separately with defendant. Defendant largely corroborated Patty's version of events. He stated when he got to the motel room, he found Patty talking on the phone with another man. He got angry, grabbed her by the throat, threw her on the bed, and slapped her "a couple of times."

Patty was taken by ambulance to the emergency room to receive treatment for her injuries. She had a swollen eye, bloody lips, and bruising on the left side of her face. Patty told the emergency room nurse that defendant hit her because they had argued about a cell phone call. She said he had hit

her repeatedly throughout the night. She did not appear to be under the influence of drugs. She told the treating physician she had taken a fist to the face.

Approximately one week after the incident, Detective Schlie called Patty for a follow-up interview. Patty confirmed she had told Thruelsen the truth about what had happened and was willing to testify to that effect. She also said about one month earlier, defendant had grabbed her by the neck and tried to push her out of a moving vehicle. She was interested in speaking to an advocate about getting a restraining order.

Defendant's ex-girlfriend, Shirley, testified to a prior incident of domestic violence. In the course of an argument with defendant, he grabbed her hair, slapped her, punched her, choked her, and threatened to kill her. Over the course of three and a half hours, he beat her 50 to 100 times. Shirley suffered whiplash, a black eye, and various bruises and scratches. As a result of this incident, defendant sustained a conviction for misdemeanor assault by means likely to produce great bodily injury.

At trial, both defendant and Patty testified with stories quite different than that originally given to police. She denied any argument with defendant. Patty testified that she had taken about 46 muscle relaxants and six pain relievers because of a foot injury. The next morning, defendant, afraid Patty had overdosed, "was pouring water on [her], hitting [her], trying to get [her] to wake up." She claimed she was still drugged when she called 911 and when she spoke with police at

the motel. She did not recall making contrary statements the night of the incident because she was drugged.

Defendant testified along the same lines as Patty, saying he saw her pills, believed she had overdosed, so he slapped her and threw ice water on her in an effort to revive her. He did not tell the police the whole truth, because he did not want them to search Patty's bag and find the drugs.<sup>1</sup> As for the incident with Shirley, he claimed she punched him first, breaking his expensive glasses, and he punched her back "a couple of times."

Detective Thruelsen did not see any prescription bottles in the motel room. Also, Patty was not wet when he interviewed her.

#### **PROCEDURAL HISTORY**

Defendant was charged with assault by means of force likely to produce great bodily injury, threatening to commit a crime resulting in death or great bodily injury, and a misdemeanor battery against a person with whom he had a dating relationship.

A jury convicted defendant on all counts. The court denied probation, finding defendant "gave a deceptive story of what happened. He has a prior record of similar behavior. What is particularly striking . . . is that he has not expressed any remorse for his conduct. He tries to explain it. A person on probation frankly needs to fess up and admit that he did wrong

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<sup>1</sup> Defendant claimed Patty also had marijuana in her bag.

and express some remorse. He has not done that. He has consistently stuck to his story, and it's just not believable." Defendant was sentenced to the low term of two years on the assault conviction, a concurrent low term of 16 months on the criminal threats conviction, and a concurrent 180 days for the misdemeanor battery.

## **DISCUSSION**

### **I.**

Defendant contends the trial court violated his due process rights "by instructing the jury that 'slight' evidence was sufficient for conviction." We disagree.

Defendant made an out-of-court statement to Detective Thruelsen that he had grabbed Patty by the throat, threw her on the bed, and slapped her when he was mad at her for speaking with another man on the phone. Based on this out-of-court statement, the court instructed the jury with CALCRIM No. 359, which states: "The defendant may not be convicted of any crime based on his out-of-court statements alone. You may only rely on the defendant's out-of-court statements to convict him if you conclude that other evidence shows that the charged crime or a lesser-included offense was committed. [¶] That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed. [¶] The identity of the person who committed the crime and the degree of the crime may be proved by the defendant's statements alone. You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt."

Defendant complains specifically that “[b]ecause defendant’s out-of-court statements are insufficient to show guilt, permitting ‘slight’ additional evidence to convict him lessened the prosecution’s burden of proof and rendered the instruction unconstitutional.” We reject this contention.

“The corpus delicti rule requires some evidence that a crime occurred, independent of the defendant’s own statements.” (*People v. Ledesma* (2006) 39 Cal.4th 641, 721.) The rule, as embodied in CALCRIM No. 359, instructs the jury as to how it should use the defendant’s out-of-court statements. The rule requires the jury take a preliminary step before using the defendant’s out-of-court statements in considering whether the prosecution has proven guilt beyond a reasonable doubt. That is, the jury must first determine whether a crime was committed, “i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause.” (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168.) “This rule is intended to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened. [Citations.]” (*Id.* at p. 1169.) In making this determination, the jury cannot rely solely on defendant’s extrajudicial statements but there must also be some independent proof of the crime. “The independent proof may be circumstantial and need not be beyond a reasonable doubt, but is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible. [Citations.] There is no requirement of independent evidence ‘of every physical act constituting an element of an offense,’

so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency. [Citation.] In every case, once the necessary quantum of independent evidence is present, the defendant's extrajudicial statements may then be considered for their full value to strengthen the case on all issues. [Citations.]" (*Id.* at p. 1171.) Put another way, the People may rely solely on a defendant's statements to convict him after they have proven by other evidence, which may be slight, that a crime occurred.

Thus, CALCRIM No. 359 correctly instructs the jury on the corpus delicti rule, as laid out in *Alvarez*, that it "may only rely on the defendant's out-of-court statements to convict him if [it] conclude[s] that other evidence shows that the charged crime [or a lesser included offense] was committed. [¶] That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed." The instruction then goes on to expressly reinstruct the jury that it cannot convict defendant unless the People have proven their case beyond a reasonable doubt.

Contrary to defendant's claim, this instruction does not dilute the prosecution's burden of proof as we stated--the instruction guides the jury's use of a defendant's out-of-court statements. Nor does the "slight evidence" language in the instruction contradict the "reasonable doubt" language. The "slight evidence" language and the reasonable doubt language address different points. One is a preliminary finding the jury

must make, that a crime was committed, and one is the ultimate finding, that defendant was the perpetrator of the crime.

In addition, the court correctly instructed the jury with CALCRIM No. 220, properly defining reasonable doubt and the requirement that the People prove each element of the offense to that standard. We find the jury could not have misunderstood the requisite burden of proof.

## **II.**

Defendant next contends the trial court erred in denying him probation "on the ground that defendant had not accepted responsibility for his crime or expressed remorse." We disagree with defendant's characterization of the record.

In denying defendant probation, the court stated: "The jury did not buy [defendant's] story, and the Court didn't buy the story either. [Defendant] was--gave a deceptive story of what happened. He has a prior record of similar behavior. What is particularly striking to the Court is that he has not expressed any remorse for his conduct. He tries to explain it. A person on probation frankly needs to fess up and admit that he did wrong and express some remorse. He has not done that. He has consistently stuck to his story, and it's just not believable. The jury didn't buy it and I'm not either."

In addition, the trial court noted it had read and considered the probation report. The probation report reflected defendant had sustained a prior domestic violence conviction, had undergone a 52-week domestic violence program and was on probation at the time of this offense. The probation officer

noted “[o]f great concern, however, are the discrepancies between the police report/preliminary hearing, the defendant’s statement, and victim’s statement. They each provide facts incongruently, and the defendant’s story does not seem plausible. If it is in fact a form of deception, successful participation on probation is not probable, as the first step to rehabilitation is an acknowledgement of wrongdoing.”

Contrary to defendant’s assertion, the court did not deny probation solely “because the defendant maintained his innocence.” The record reflects that despite having been on probation previously for a domestic violence offense and having completed a domestic violence program, defendant reoffended and had not demonstrated any remorse for that past domestic violence conviction.

Defendant is correct that it is inappropriate to use lack of remorse as a factor to deny probation where the defendant has denied guilt and the evidence of guilt is conflicting. (*People v. Holguin* (1989) 213 Cal.App.3d 1308, 1319.) It is equally well settled that when “a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper.” (*People v. Price* (1991) 1 Cal.4th 324, 492.) Here, the court denied probation because of defendant’s deception, his prior record and the fact that he was on probation for a domestic violence offense at the time that he committed this domestic violence offense. His lack

of remorse for either the current or the past offense was also a factor. Given this record, however, it is not reasonably probable the court would have granted probation if it had removed defendant's lack of remorse for his current offense from its consideration. Accordingly, the court did not abuse its discretion in denying probation.

**DISPOSITION**

The judgment is affirmed.

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CANTIL-SAKAUYE, J.

We concur:

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SCOTLAND, P. J.

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HULL, J.